



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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May 11, 2021

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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CT Corporation System, Agent
Eastern Metal Recycling-Terminal, LLC
820 Bear Tavern Road
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Certified Mail #: 7019 2970 0001 9153 2879

Re: 60-Day Notice of Violations and Intent to File Suit Regarding Noncompliance with
Federal Clean Air Act and Federal Clean Water Act:
1 Brayton Point Road, Somerset, MA

Dear Sirs/Madams,

We write to give notice that the Massachusetts Attorney General's Office intends to file a civil action on behalf of the Commonwealth of Massachusetts in the United States District Court for the District of Massachusetts under section 304 of the Federal Clean Air Act, 42 U.S.C. § 7604, and section 505 of the Federal Clean Water Act, 33 U.S.C. § 1365, against Brayton Point LLC, Patriot Stevedoring & Logistics, LLC ("Patriot"), and Eastern Metal Recycling-Terminal, LLC ("EMR") (referred to herein collectively as the "Companies") for violations of the Federal Clean Air Act and Federal Clean Water Act occurring at a scrap metal and water transportation facility (the "Facility") in Somerset, Massachusetts. The subject of the action will be the Companies' unlawful air emissions of particulate matter ("PM" or "dust") and violations of EPA's Multi-Sector General Permit for Industrial Stormwater ("MSGP") as a result of the scrap metal and water transportation activities at the Facility. The complaint will also allege violations of the Massachusetts Air Act, G.L. c. 111, § 142A and seek to abate the Companies' creation of a public nuisance from dust and noise emissions.

The Attorney General's Office will ask the Court to order the Companies' future compliance with the Federal Clean Air Act, the Federal Clean Water Act, the Massachusetts Air Act, and other applicable environmental laws, to assess civil penalties in an appropriate amount,¹ award the Commonwealth its litigation costs, including attorney and expert fees, and award any other relief the Court deems appropriate. The Commonwealth's complaint will be filed a minimum of 60 days after the postmark date of this letter. This is a formal 60-day notice of intent to sue that is being served pursuant to 40 C.F.R. Part 135 and 40 C.F.R. Part 54.

This notice is being provided by the Commonwealth of Massachusetts, acting by and through the Office of Attorney General Maura Healey.

Counsel for the Commonwealth of Massachusetts in this case are:

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BACKGROUND

Air Pollution from the Facility

EMR operates a scrap metal recycling operation at the Brayton Point Commerce Center owned by Brayton Point LLC located at One Brayton Point Road in Somerset, Massachusetts (the "Facility"). Patriot is the marine terminal operator at the Facility. The Companies' operations result in the emission of dust into the atmosphere in the vicinity of the Facility. This dust is generated by the Companies' movement, storage, and transport of ferrous and non-ferrous scrap metal at the Facility. The scrap metal consists of large and small pieces ("Scrap Metal Materials") and includes small particles. The Scrap Metal Materials mix with sediment on the ground surface and are mobilized by wind. Scrap Metal Materials are brought to the Facility via trucks, are moved around the Facility by heavy equipment, and are loaded onto

¹The Court has authority to impose penalties of up to \$102,638 per day for each violation of the Federal Clean Air Act and up to \$55,800 per day for each violation of the Federal Clean Water Act pursuant to 42 U.S.C. §§ 7413(b), 7604(a), 40 CFR § 19.4, and 85 Fed. Reg. 83818 (Dec. 23, 2020).

ships by heavy equipment for transport to different places across the globe. The Companies and persons that visit the Facility in the ordinary course of business scatter these Scrap Metal Materials around the Facility, including on its ground surface and into the air. Dust from the Facility travels to the surrounding environment, including to a residential community of Somerset as close as 500 yards from the Facility (“Brayton Point Residential Neighborhood”). These dust emissions violate the Federal Clean Air Act and the Massachusetts Air Act. Dust from the Facility contains heavy metals and fine particulates, and poses health risks to exposed individuals, particularly those among at-risk populations, such as children.

Below are two photographs illustrating conditions at the Facility as they appeared from the east looking west on March 15, 2021 and April 22, 2021.

March 15, 2021:



April 22, 2021:



Members of the Brayton Point Residential Neighborhood complain that dust from the Facility has landed on their homes, windows, plants, cars, and other property. Members of the Brayton Point Residential Neighborhood complain that they are experiencing eye irritation, throat irritation, increased asthma, and additional need for medical care because of the dust emissions. As a result of the Companies' activities, nearby residents, including people living in the Brayton Point Residential Neighborhood, are being exposed to potential harms associated with inhalation of PM and heavy metals. The presence of dust from the Facility in the Brayton Point Residential Neighborhood is causing a nuisance, is potentially injurious to human or animal life, to vegetation, or to property, and is unreasonably interfering with the residents' comfortable enjoyment of their lives, properties, or conduct of their businesses.

Water Pollution from the Facility

The Companies store Scrap Metal Materials in piles uncovered at the Facility. The Companies use excavators, trucks, and other heavy equipment to move Scrap Metal Materials around the Facility. During this process, Scrap Metal Materials and some of the PM emitted by the operations settle on the ground and other surfaces in the vicinity of the Facility. Rainwater and snowmelt (jointly "stormwater") that comes in contact with Scrap Metal Material and exposed surfaces at the Facility discharges to Mount Hope Bay directly and is pumped into Mount Hope Bay by the Companies.

Stormwater that comes into contact with roads, vehicles, equipment, and material piles at the Facility picks up sediment and is discharged to Mount Hope Bay from locations including the Facility's northeastern end. The following annotated images depict one area of the Facility from which the Companies are discharging industrial stormwater into Mount Hope Bay.



In addition to the stormwater that flows of the northern side of the Facility, stormwater from a large portion of the Facility flows to a pond on the south side of the Facility. The Companies pump water from this pond into Mount Hope Bay through a hose. The following annotated image depicts the location of the stormwater pond.



Mount Hope Bay is a state-listed impaired tidal estuary located at the mouth of the Taunton River on the Massachusetts and Rhode Island border. Mount Hope Bay has played an important role in the history of the area, from pre-colonial times to the present. While many years of sewage and industrial pollution have severely degraded the quality of the shallow waters of the bay, major efforts to clean it up and restore it have been implemented and are under way. The Commonwealth has designated the portion of the Taunton River that is tidally connected the Mount Hope Bay to be “Core Habitat” critical to the long-term persistence of over a dozen species, including the state and federally endangered Atlantic Sturgeon.

The Companies’ stormwater discharges contain heavy metals, organic materials, and suspended sediments. These pollutants, when discharged in excessive amounts, threaten aquatic ecosystems, the food chain, and human health.

Noise Pollution from the Facility

The Commonwealth’s Complaint, when filed, will also address the public nuisance being caused by excessive noise pollution at the Facility. Since it began operating in August 2019, the Facility has emitted loud noises that disrupt the peace and comfort of nearby residents and interfere with nearby residents’ ability to enjoy their lives and properties, including their ability

to sleep. Loud noises occur when Scrap Metal Materials are brought to the Facility by trucks, moved around the Facility by Heavy Equipment, and loaded onto ships with Heavy Equipment.

The Companies emit loud noises from the Facility all day every Monday through Friday from 7:30 a.m. to 5:30 p.m. When the Companies are loading a ship at the Facility, the noises continue 24-hours a day until the ship leaves. Loading takes place on average every five weeks and continues for approximately 4 days.

The noises consist of loud and almost constant banging and scraping of metal against metal. The noise can sound like thunder when ships are being loaded. Noises carry over the water between surrounding neighborhoods and the Facility. These sounds are even more disruptive during the warm weather months, when residents would like to have their windows open. The loud noises emitted by the Companies cause nearby residents to change their plans, close their windows, and lose sleep. Children who live near the Facility complain that the lack of sleep and disruption caused by the noise and dust emissions are interfering with their ability to perform well in school and otherwise enjoy their activities.

APPLICABLE FEDERAL LAWS

A. THE REQUIREMENTS OF THE FEDERAL CLEAN AIR ACT

The Federal Clean Air Act sets out a comprehensive regulatory scheme designed to prevent air pollution and to protect and enhance the quality of the Nation's air resources to promote the public health and welfare. 42 U.S.C. § 7401. EPA has established National Ambient Air Quality Standards ("NAAQS") for a number of "criteria pollutants," such as PM. *Id.* § 7409; 40 C.F.R. Part 50. An area that meets the NAAQS for a particular criteria pollutant is deemed to be in "attainment" for that pollutant. 42 U.S.C. § 7407(d)(1). An area that does not meet the NAAQS is a "nonattainment" area. *Id.*

Each state is required to develop a "state implementation plan" ("SIP") to achieve the NAAQS established by EPA. 42 U.S.C. § 7410(a). SIPs set forth requirements for permitting programs and specific emission standards and limitations to assure that geographic areas either remain in attainment or regain attainment status. Once a state's SIP is approved by EPA, it is referenced in the Code of Federal Regulations and becomes enforceable under federal law. 42 U.S.C. § 7413; 40 C.F.R § 52.23.

Certain Massachusetts air pollution regulations designed to achieve and maintain attainment with the NAAQS have been approved by EPA and incorporated into the Massachusetts SIP and are therefore enforceable under the Federal Clean Air Act. These regulations include provisions regulating emissions of dust.

Pursuant to 310 C.M.R. § 7.09(1), "[n]o person having control of any dust ... generating operations ... shall permit emissions therefrom which cause or contribute to a condition of air pollution. 310 C.M.R. § 7.09(1). Similarly, 310 C.M.R. § 7.01(1) makes it unlawful for any

person to “cause, suffer, allow, or permit the handling, transportation, or storage of any material in a manner that results or may result in emissions therefrom which cause or contribute to a condition of air pollution,” and 310 C.M.R. § 7.01(1) states: “[n]o person owning, leasing, or controlling the operation of any air contamination source shall willfully, negligently, or through failure to provide necessary equipment or to take necessary precautions, permit any emission from said air contamination source or sources of such quantities of air contaminants which will cause, by themselves or in conjunction with other air contaminants, a condition of air pollution.” The term “air pollution” means: “the presence in the ambient air space of one or more air contaminants or combinations of air contaminants in such concentrations and of such duration as to cause a nuisance; be injurious or potentially injurious to human or animal life, vegetation or property; or unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business.” 310 C.M.R. § 7.00.

Any person may commence a civil enforcement action under the Federal Clean Air Act against any party “who is alleged to have violated ... or to be in violation of [] an emission standard or limitation.” 42 U.S.C. § 7604(a). The Commonwealth is entitled to bring suit under 42 U.S.C. § 7604 because it is a “person” as defined by 42 U.S.C. § 7602(e).

B. THE REQUIREMENTS OF THE FEDERAL CLEAN WATER ACT

1. Pollutant Discharges Without a Permit Are Illegal.

The Clean Water Act makes the discharge of pollution into waters of the United States unlawful unless the discharge is in compliance with certain statutory requirements, including the requirement that the discharge be permitted by the EPA under the National Pollutant Discharge Elimination System program. *See* sections 301(a), 402(a) and 402(p) of the Act. 33 U.S.C. §§ 1311(a), 1342(a), 1342(p).

2. Scrap Recycling and Water Transportation Facilities Must Comply with EPA’s General Industrial Stormwater Permit.

Polluted stormwater is the leading cause of water quality impairment in Massachusetts. During every rain or snowmelt event, runoff flows over the land surface, picking up potential pollutants such as sediment, nutrients, metals, and petroleum by-products. In order to minimize polluted stormwater discharges from certain categories of industrial facilities, EPA issued the Stormwater Permit.² Scrap Recycling and Water Transportation Facilities, like the Facility, are subject to the requirements of this permit.³ Facilities that carry on multiple types of activities that

² The Stormwater Permit was first issued in 1995 and most recently reissued in February 2021 in substantially similar form. *See* 60 Fed. Reg. 50804 (Sept. 29, 1995); 65 Fed. Reg. 64746 (Oct. 30, 2000); 73 Fed. Reg. 56572 (Sept. 29, 2008); 86 Fed. Reg. 10269 (Feb. 19, 2021). The February 2021 revision of the Stormwater Permit (“2021 Stormwater Permit”) is substantially similar to the 2015 version (“2015 Stormwater Permit”). Where there is a difference in citations due to numbering, this Notice Letter provides citations to each of the revisions. Where there is no difference in section numbering, this Notice Letter refers to the two versions jointly as “Stormwater Permit.”

³ Stormwater Permit, Appendix D, pg. D-4.

are subject to the requirements of the Permit must also comply with any sector-specific requirements for such co-located industrial activity.⁴

The Permit requires the Facility to, among other things:

- a. submit a “complete and accurate Notice of Intent” for the Facility that lists all stormwater outfalls by a unique 3-digit code and corresponding latitude and longitude coordinates (Stormwater Permit Appendix G; 2015 Stormwater Permit section 1.2.1; 2021 Stormwater Permit section 1.3);
- b. prepare a Stormwater Pollution Prevention Plan (“SWPPP”) for the Facility that includes, among other things:
 - i. an adequate site description that includes the locations of all stormwater outfalls, the locations of all stormwater conveyances, a site map with the boundaries of industrial activity at the Facility, a description of the nature of the industrial activities at the Facility, and the location of potential pollutant sources (2015 Stormwater Permit section 5.2.3; 2021 Stormwater Permit section 6.2.2);
 - ii. a description of monitoring procedures including locations where samples are collected, procedures for collection, and parameters for sampling (2015 Stormwater Permit section 5.2.5.3; 2021 Stormwater Permit section 6.2.5.3);
 - iii. a description of control measures to meet technology-based and water quality-based effluent limitations (2015 Stormwater Permit section 5.2.4; 2021 Stormwater Permit section 6.2.4);
 - iv. a description of how and why the chosen control measures were selected (2015 Stormwater Permit section 5.2.4; 2021 Stormwater Permit section 6.2.4);
 - v. a description of the schedule of maintenance and good housekeeping measures used to comply with effluent limits (2015 Stormwater Permit section 5.2.5.1; 2021 Stormwater Permit section 6.2.5.1); and
 - vi. an evaluation of unauthorized non-stormwater discharges (2015 Stormwater Permit section 5.2.3.4; 2021 Stormwater Permit section 6.2.3);
- c. select, design, install, and implement pollutant control measures that reduce and/or eliminate pollutants to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice (Stormwater Permit section 2);
- d. minimize contact of stormwater runoff with industrial materials, including scrap metal materials, and equipment (Stormwater Permit section 8.N.3.1.2);
- e. keep clean all exposed areas that are potential sources of pollutants by storing materials in appropriate containers, properly controlling runoff associated

⁴ 2015 Stormwater Permit, pg. 1; 2021 Stormwater Permit, pg. 9.

- with dumpsters, and keeping exposed areas free of waste, garbage and floatable debris (Stormwater Permit section 2.1.2.2);
- f. minimize generation of dust and off-site tracking of industrial materials, including scrap metal materials, in order to minimize pollutant discharges (Stormwater Permit section 2.1.2.10);
- g. monitor stormwater discharges from all outfalls for compliance with benchmarks applicable to scrap metal recycling and water transportation facilities (2015 Stormwater Permit sections 6.2.1, 8.N.6, and 8.Q.6; 2021 Stormwater Permit sections 4.2.2, 8.N.7, and 8.Q.7);
- h. report all benchmark monitoring data to EPA within mandatory deadlines (2021 Stormwater Permit section 7.4; 2021 Stormwater Permit section 7.3); and
- i. prevent or eliminate unpermitted discharges of non-stormwater from the Facility (2015 Stormwater Permit section 1.1.4.1; 2021 Stormwater Permit section 1.1.3.1).

THE COMPANIES' VIOLATIONS AND DATES OF VIOLATIONS

A. VIOLATIONS OF THE FEDERAL CLEAN AIR ACT

The Companies' operations violate emission standards or limitations under the Federal Clean Air Act, as those terms are used in 42 U.S.C. § 7604(a) and as defined in 42 U.S.C. § 7604(f)(4), because they cause or contribute to a condition of air pollution, as discussed below.

The Companies' excessive dust emissions, in close proximity to the Brayton Point Residential Neighborhood, have caused or contributed to a condition that is "potentially injurious to human or animal life" or will "unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business." These excessive emissions violate Massachusetts regulations prohibiting persons operating dust-generating facilities from causing or contributing to a condition of air pollution. 310 C.M.R. § 7.09(1). *See also* 310 C.M.R. § 7.01(1). They also violate Massachusetts regulations prohibiting the handling, transportation, or storage of industrial materials "in a manner that results or may result in emissions therefrom which cause or contribute to a condition of air pollution." 310 C.M.R. § 7.09(4). These regulations are incorporated into the EPA-approved SIP and are enforceable provisions of the Federal Clean Air Act. *See* 42 U.S.C. §§ 7604(a)(1), 7604(f)(4). Excessive dust emissions occurred on numerous days since September 1, 2019, including but not limited to:

December 12, 2020
December 13, 2020
December 22, 2020
December 23, 2020
January 2, 2021
January 3, 2021

March 15, 2021
April 22, 2021

The Commonwealth anticipates that discovery and additional fact-finding will show that violations occurred on other dates besides the dates listed above. The Commonwealth's Complaint, when filed, will seek penalties for all excessive dust emissions violations that occurred since September 1, 2019.

B. VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

1. Companies' Violations of the Stormwater Permit

The Companies have failed to prepare adequate SWPPPs that meet the requirements of the Stormwater Permit. These violations have occurred on each day since at least September 1, 2019.⁵ The SWPPPs prepared by EMR and Patriot are deficient for the following reasons:

- a. neither SWPPP identifies the location of all stormwater discharge points;
- b. neither SWPPP identifies or describes the way stormwater is discharged from the pond at the southwest corner of the Facility or identifies or describes the location at the north end of the Facility where stormwater passes through a pervious barrier during heavy rain events as an outfall;
- c. neither SWPPP identifies the location of all stormwater conveyances;
- d. neither SWPPP identifies or describes the way stormwater is pumped around and off the Facility;
- e. neither SWPPP accurately describes the boundaries of industrial activity at the Facility;
- f. neither SWPPP includes a complete description or depiction of industrial activities occurring on the northeast side of the Facility;
- g. neither SWPPP describes or documents the locations where stormwater benchmark monitoring samples are collected at the Facility;
- h. neither SWPPP describes the procedures for collection of sampling;
- i. neither SWPPP shows how the Companies are minimizing pollutants to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practices. For example, neither SWPPP describes any maintenance or cleaning of the pond at the southwest corner of the Facility, or the manner in which stormwater is discharged from the pond. There is reference in the EMR SWPPP to an "oil and water separator" in the vicinity of the pond, but the oil water separator is not depicted on the site plan and is not described elsewhere in either SWPPP;

⁵ It is the Commonwealth's position that violations of the Stormwater Permit have occurred on each day since at least September 2019. In addition, violations that occurred on days when rain or snowmelt discharged from the Facility are listed on attachment A hereto.

- j. neither SWPPP describes how and why any chosen control measures were selected;
- k. neither describes a schedule of maintenance and good housekeeping measures used to minimize pollutant discharges; and
- l. neither SWPPP adequately describes the process by which the Companies evaluated whether there are any unauthorized non-stormwater discharges from the Facility.

In addition, the Companies have not selected, designed, installed, and implemented pollutant control measures that reduce and/or eliminate pollutants to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice. These violations have occurred on each day since at least September 1, 2019. Because the Companies have not adequately analyzed pollutant sources or pollutants in stormwater from the Facility, they cannot know what control measures are appropriate to minimize pollutant discharges. The Companies failed to minimize contact of stormwater runoff with Industrial Materials and equipment. The Companies have not kept clean all exposed areas that are potential sources of pollutants by storing materials in appropriate containers, properly controlling runoff associated with dumpsters, and keeping exposed areas free of waste, garbage, and floatable debris. The Companies have not minimized generation of dust and off-site tracking of Scrap Metal Materials in order to minimize pollutant discharges.

The Companies have failed to adequately monitor stormwater discharges from the Facility. The Companies' monitoring does not comply with the Stormwater Permit for the following reasons:

- a. The Companies failed to monitor and control stormwater that is discharged during significant storm events from the northeast portion of the Facility. These violations occurred on each day since September 1, 2019.
- b. The Companies failed to monitor from the Designated Outfall during the third quarter of 2020 and reported that the Facility had no discharge during that quarter even though the Companies pumped some of the contents of the Facility's pond into Mount Hope Bay from the Designated Outfall on July 2, 2020. The Companies' failure to monitor violations occurred on each day since September 30, 2020, the last day of the third quarter of 2020. The Companies' incorrect reporting violations occurred on each day since October 31, 2020, the date on which third quarter reporting was due.
- c. The Companies' monitoring reports to EPA for the first quarter of 2020 were incomplete. They failed to include measurements for copper, zinc, TSS and COD. These violations occurred on each day since May 1, 2020.

Finally, the Companies' stormwater mixes with dust suppression water sprayed on Scrap Metal Materials. Dust suppression water is not an authorized non-stormwater discharge that can be covered under the Stormwater Permit. It is likely that stormwater discharged to Mt. Hope Bay

has commingled with dust suppression water. Accordingly, violations of the prohibition against unpermitted discharges have occurred on each day since September 1, 2019 that the Companies discharged stormwater commingled with dust suppression water from the Facility.

- C. PENDENT STATE CLAIMS: Violations of the Massachusetts Air Act and its Implementing Regulations (G.L. ch. 111, § 142A; 310 C.M.R. §§ 7.01(1); 7.09(1), 7.09(4), and 7.02(3)(f)) and Creation of a Public Nuisance (G.L. c. 12, §§ 7 and 11D, and common law).

The complaint will further allege that the Companies violated the Massachusetts Air Act by emitting excessive amounts of PM into the air in violation of G.L. c. 111, § 142A, 310 C.M.R. §§ 7.01(1), 7.09(1) and 7.09(4) and will allege that the Companies have created a public nuisance as set forth in G.L. c. 12, §§ 7 and 11D, and common law, by emitting dust and noises that annoy and disrupt the peace and comfort of neighbors who live in the vicinity of the Facility.⁶

CONCLUSION

The Attorney General's Office believes this Notice of Violations and Intent to File Suit sufficiently states the basis for a civil action. Because of the importance of this matter, we urge you to have your attorney contact us **immediately** so that these significant compliance matters may be resolved.

COMMONWEALTH OF MASSACHUSETTS
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⁶ This 60-day Notice of Intent to Sue sets forth certain federal Clean Air Act and federal Clean Water Act claims against the Companies in accordance with 40 C.F.R. Part 54 and 40 C.F.R. Part 135. This Notice is in no way meant to address other violations of environmental laws. The Commonwealth reserves the right to include in its Complaint any and all applicable claims for violations of state environmental and nuisance laws.

Eastern Metal Recycling-Terminal, LLC, Patriot Stevedoring & Logistics, LLC and Brayton Point LLC
May 11, 2021
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cc:

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DAYS BETWEEN
SEPTEMBER 1, 2019 AND MAY 1, 2021
ON WHICH STORMWATER FROM FACILITY
DISCHARGED INTO WATERS OF THE UNITED STATES

Year	Month	Date
2019	September	
2019	October	10, 17, 28
2019	November	25
2019	December	2, 3, 10, 14, 18, 30, 31
2020	January	
2020	February	13, 27
2020	March	20, 24, 29, 30
2020	April	10, 14, 18
2020	May	1, 9
2020	June	12
2020	July	15
2020	August	
2020	September	30
2020	October	13, 14, 17, 30
2020	November	2, 24
2020	December	1, 6, 13, 17, 25, 26,
2021	January	16, 17
2021	February	2, 8, 16
2021	March	19, 29
2021	April	1, 16, 17, 26
2021	May	